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No. 79-1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit *En Banc*

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

SCOTT E. THOMAS
Attorney

Attorneys for
FEDERAL ELECTION COMMISSION,
MAX L. FRIEDERSDORF,
JOHN W. MCGARRY,
JOAN D. AIKENS,
THOMAS E. HARRIS,
FRANK P. REICHE,
ROBERT O. TIERNAN,
EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

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QUESTIONS PRESENTED

Whether appellants have no right to appeal a decision of the United States Court of Appeals for the Ninth Circuit rendered *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

Whether appellants may not use the extraordinary judicial review mechanism of 2 U.S.C. §437h to circumvent a pending administrative enforcement proceeding subject to judicial review under the separate procedure of 2 U.S.C. §437g.

Whether, if an appeal does lie, this Court should summarily affirm the *en banc* decision of the court of appeals, rendered after full consideration of the issues, that 2 U.S.C. §§441a(a)(1)(C), 431(8)(B)(vi),* and 441b(b)(2)(C) are consistent with the first and fifth amendments to the Constitution of the United States.

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* *See* note 2, *infra.*

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CALIFORNIA MEDICAL ASSOCIATION, ET AL., *Appellants,*

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On Appeal From The United States Court Of Appeals For The Ninth Circuit *En Banc*

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Appellee Federal Election Commission ("The Commission" or "FEC") moves to dismiss this appeal because appellants may not invoke the appellate jurisdiction of this Court where the United States Court of Appeals for the Ninth Circuit specifically declined to consider this case and render its decision *en banc* pursuant to 2 U.S.C. §437h[1] and where appellants are defendants

[1] This provision is §310 of the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The relevant provisions of the Act are codified in Title 2, *United States Code*. Because of the recent amendments to the statute, citations herein will be to the *United States Code* sections as they appear in *United States Code Annotated* (West Cum. Ann. Pocket Part 1980), unless otherwise indicated.

in a Commission enforcement proceeding presently pending under 2 U.S.C. §437g which will be subject to judicial review in the court of appeals and by petition for writ of certiorari to this Court in the ordinary course of appellate procedure. Treating appellants' Jurisdictional Statement as a petition for writ of certiorari, the petition should be denied. In the alternative, should the Court find that an appeal does lie pursuant to 2 U.S.C. §437h, it should affirm the decision below because the questions presented were correctly decided and any remaining questions are so unsubstantial as not to need further argument.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit on May 23, 1980, answered questions certified to it by the United States District Court for the Northern District of California. The decision of the court of appeals and the district court order which certified the constitutional questions are printed as Appendix A and Appendix C to appellants' Jurisdictional Statement. The decision of the court of appeals is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127 (1980).

JURISDICTION

Appellants assert jurisdiction pursuant to 28 U.S.C. §§1331, 2201 and 2202 and pursuant to FECA's unique jurisdictional provision, 2 U.S.C. §437h.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 *et seq.* Specifically at issue in this appeal are 2

U.S.C. §§437h and 437g with regard to the jurisdiction of this Court, and 2 U.S.C. §§441a(a)(1)(C), 431(8)(B)(vi),[2] and 441b with regard to the merits of the decision below. For the Court's convenience, these provisions are set forth in Appendix A to this motion.

STATEMENT OF THE CASE

This action arose from an enforcement proceeding before the Federal Election Commission initiated on October 4, 1978, when the Commission, pursuant to 2 U.S.C. §437g(a)(2), found "reason to believe" that the California Medical Association ("CMA"), an unincorporated association, had violated the $5,000 contribution limit of 2 U.S.C. §441a (a)(1)(C) by contributing in excess of $5,000 per calendar year to the California Medical Political Action Committee ("CALPAC"), a multicandidate political committee.[3] After the Commis-

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[2] Section 431(8)(B)(vi) is the recodification of former 2 U.S.C. §431(e)(5)(F) pursuant to Sec. 101 of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 at 1341. The court of appeals' decision used the former citation, §431(e)(5)(F).

[3] Under 2 U.S.C. §441a(a)(1), a "person" (defined at 2 U.S.C. §431(11) to include an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons) may contribute $1,000 per election to a federal candidate or his or her authorized political committees, $20,000 per calendar year to the political committees of the national parties, and $5,000 per calendar year to any other political committee. A "multicandidate political committee" (defined at 2 U.S.C. §441a(a)(4) as a political committee which has registered for six months, received contributions from more than fifty persons, and contributed to five or more federal candidates) may contribute $5,000 to a candidate or his or her authorized political committees, $15,000 to the political committees of the national parties, and $5,000 to any other political committee. Individuals are limited to contributing $25,000 overall in any calendar year under 2 U.S.C. §441a(a)(3). Political parties are entitled to spend additional amounts on behalf of federal candidates under 2 U.S.C. §441a(d). (cont.)

sion found "probable cause to believe" that CMA had violated the statute and authorized its staff to file a civil enforcement action, CMA and CALPAC brought this suit in the United States District Court for the Northern District of California challenging the statutory provisions sought to be enforced against them. The Commission filed its enforcement action in the same district court fifteen days later. *Federal Election Commission* v. *California Medical Association,* No. C-79-1197-WHO (N.D. Cal., filed May 22, 1979)(awaiting trial decision).

Denying the Commission's motion to dismiss CMA's action for lack of subject matter jurisdiction, the district court certified four constitutional questions to the United States Court of Appeals for the Ninth Circuit "for hearing *en banc,* pursuant to 2 U.S.C. §437h." Appellants' Jurisdictional Statement, Appendix

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Corporations and labor organizations are flatly prohibited from making any contribution or expenditure in connection with any federal election under 2 U.S.C. §441b(a). The only exceptions to this proscription allow corporations and labor organizations to pay for communications and certain non-partisan activities directed at specified classes and to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund. 2 U.S.C. §441b(b)(2).

The term "contribution" as used in the contribution limitations of 2 U.S.C. §441a is defined at 2 U.S.C. §431(8) to include "any gift subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." Exempted from this definition and hence from the contribution limitations is "any payment made or obligation incurred by a corporation or a labor organization which, under §441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." 2 U.S.C. §431(8)(B)(vi). Thus, payments by an unincorporated association for the administration and solicitation expenses of a political committee are contributions subject to 2 U.S.C. §441a(a)(1)(C).

C ("J.S. App. _____"). The court of appeals *en banc* issued a decision on the certified questions on May 23, 1980. J.S. App. A. The court stated:

> We hear the appeal en banc pursuant to Fed. R. App. P. 35. Standing and jurisdiction are conferred by, *inter alia,* 2 U.S.C. §437h(a)(1976). *See Buckley* v. *Valeo,* 424 U.S. 1, 8-12 (1976)(per curiam).

Id. at A-3. However, after posing the question of §437h's constitutionality and of the potentially "severe and disruptive" effect of §437h on the court's calendar, the court of appeals concluded:

> Delicate questions such as those here suggested are to be decided only when necessary. We think the better course is to let our decision to hear the case en banc rest on our authority under Fed. R. App. P. 35. *See Buckley* v. *Valeo,* 519 F.2d 821, 902 n.2 (D.C. Cir. 1975)(per curiam)(en banc), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976) (per curiam).

J.S. App. A at A-26.

ARGUMENT

I. No Right Of Appeal Lies To This Court From An *En Banc* Decision Of A United States Court Of Appeals Rendered Pursuant To Rule 35 Of The Federal Rules Of Appellate Procedure.

The court of appeals expressly stated that it was hearing this case *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure. J.S. App. A at A-3, A-26. The court clearly decided that §437h did not require that it "hear the matter sitting en banc." By so deciding, the court rejected 2 U.S.C. §437h as the jurisdictional basis for its *en banc* disposition of the questions before it. Because the court of appeals' decision was not rendered under §437h, CMA and CALPAC have no right of appeal to this Court under that provision.[4]

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the initial case heard pursuant to the extraordinary review procedure of §437h, although the court of appeals cited

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[4] As is argued in Part II, *infra*, appellants' proper avenue of judicial review is pursuant to 2 U.S.C. §437g. The general jurisdictional statutes of Title 28, *United States Code*, such as §1331, are not available to appellants. Where Congress has provided specific judicial review mechanisms within a comprehensive regulatory scheme, litigants may not bypass such provisions and ground jurisdiction upon the general statutes of Title 28. *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411, 419-422 (1965); *Grutka* v. *Barbour*, 549 F.2d 5, 7 (7th Cir. 1977); *cert. denied*, 431 U.S. 908 (1977); *Wellens* v. *Dillon*, 302 F.2d 442 (9th Cir. 1962). To the extent that appellants' Jurisdictional Statement can be construed as a petition for writ of certiorari, the petition must be denied for reasons stated *infra* at Part III.

Rule 35 in its order preliminarily deeming the case to be properly certified, 519, F.2d 821, 902 n.2 (D.C. Cir. 1975), in subsequently directing the district court to prepare a factual record the court assumed §437h as the basis for its jurisdiction. Moreover, the overriding circumstances of *Buckley* precluded defendant-appellees from contesting the appealability of the court of appeals' *en banc* decision. This Court merely observed that "[j]urisdiction was asserted under 28 U.S.C. §§1331, 2201 and 2202, §315(a) of the Act, 2 U.S.C. §437h(a)(1976 ed., Supp. IV)." 424 U.S. at 8. *See also, Clark* v. *Valeo,* 559 F.2d 642 (D.C. Cir. 1977)(en banc)(per curiam), *aff'd sub nom. Clark* v. *Kimmitt,* 431 U.S. 950 (1977) (this Court affirmed the *en banc* decision that the constitutional questions certified under §437h were not ripe for review); *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980)(en banc)(per curiam), *aff'd,* 100 S. Ct. 1639 (1980) (this Court affirmed the *en banc* decision which answered a constitutional question certified under §437h). The court of appeals decisions in both *Clark* and *RNC* were specifically rendered pursuant to §437h.

Where, as in this case, the court below disclaims §437h as the basis for its *en banc* decision, the right of direct appeal provided for in §437h is not available. Accordingly, the Court should dismiss this appeal because it is not taken in conformity with statute.

II. This Court Lacks Jurisdiction Over This Action Because Appellants May Not Use The Extraordinary Procedure of 2 U.S.C. §437h To Circumvent Judicial Review Through The Enforcement Proceeding Pending Against Them Under 2 U.S.C. §437g.

By bringing an action in the district court pursuant to §437h, appellants attempted to circumvent the enforcement proceeding pending against them under 2 U.S.C. §437g. However, 2 U.S.C. §437g, providing for the initiation of civil enforcement actions by the Commission, an expedited procedure for appeal to a United States court of appeals and review by this Court upon certiorari or certification, is the exclusive method of judicial review available to appellants.

Congress has provided an orderly and carefully balanced system of remedies and judicial review for persons affected by the enforcement process of the Act. The Commission, reconstituted after this Court's decision in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), has broad authority to administer and seek compliance with the Act's provisions, *see* 2 U.S.C. §§437c(b), 437d(a), 437f, 437g, 438, and has exclusive jurisdiction for civil enforcement of the Act, *see* 2 U.S.C. §§437c(b)(1), 437d(e). Persons who feel they may be adversely affected by the Act may seek an advisory opinion from the Commission concerning the application of the statute or of a rule or regulation prescribed by the Commission. 2 U.S.C. §437f. However, once made the subject of the Act's enforcement process, such persons are relegated to a well planned system for resolution of the claims involved. *See* 2 U.S.C. §437g(a)(1),(a)(3), (a)(4), (a)(6), (a)(9), (a)(10).

Congress could not have intended that persons made the subject of the enforcement procedures of

§437g would be able to defeat that process by invoking the unusual procedure of §437h. The legislative history of §437h indicates that it was intended by its sponsor, Senator Buckley, for the narrow purpose of allowing expeditious review of his contemplated challenges to what became the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. 120 Cong. Rec. 10562 (1974). The provision is limited by its very terms to actions "*as may be appropriate* to construe the constitutionality of any provision of this Act" (emphasis added). Only a specified class of eligible plaintiffs — the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President — is permitted to invoke §437h. By at the same time establishing a detailed statutory scheme for persons brought into the enforcement process, with ample opportunity for judicial review, Congress intended §437h to have a separate, limited purpose.[5]

The United States District Court for the District of Columbia has recognized that the Commission's enforcement actions cannot be circumvented by an action to certify constitutional questions under §437h. *National Right to Work Committee* v. *Federal Election Commission, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122

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[5] Where, as in the present case there is clearly an adequate procedure for obtaining judicial review of the statutory provisions challenged, equitable concepts preclude courts from invoking the machinery of §437h. *See United States* v. *Clifford,* 409 F. Supp. 1070 (E.D.N.Y. 1976)(no need to invoke §437h in a criminal action since adequate review may be had on appeal); *see also, analogously, Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 929 (1975)(equitable concepts precluded granting injunctive and declaratory relief where a pending state civil proceeding was initiated shortly after federal suit).

(D.D.C. Apr. 24, 1980), *appeal docketed,* No. 80-1488 (D.C. Cir. May 7, 1980). In *NRWC,* persons who were the subject of an enforcement proceeding before the Commission filed suit in the United States District Court for the Eastern District of Virginia challenging the constitutionality of the provisions of FECA involved in the enforcement proceeding, and moved to certify constitutional questions pursuant to §437h. The Commission filed its civil enforcement action in the United States District Court for the District of Columbia shortly thereafter. *Federal Election Commission* v. *National Right to work committee, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122, *appeal docketed,* No. 80-1487 (D.C. Cir. May 7, 1980). The District of Columbia court consolidated the cases and, without certifying constitutional questions to the court of appeals, upheld the constitutionality of the provisions attacked. The decision has been appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to the conventional procedure of 2 U.S.C. §437g.

Section 437h has been narrowed by most federal courts faced with its construction. Thus, the United States Court of Appeals for the District of Columbia Circuit stated in *Clark* v. *Valeo,* 559 F.2d 642, 646 n.2 (D.C. Cir. 1977)(per curiam), *aff'd sub nom. Clark* v. *Kimmitt,* 431 U.S. 950 (1977):

> A district judge requested to make certification under §437h should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court *en banc.* . . .

See also Mott v. *Federal Election Commission,* No. 79-3375 (D.D.C. June 30, 1980) *appeal docketed,* No. 80-1949 (D.C. Cir. Aug. 12, 1980)(§437h action dismissed for lack of ripeness and failure to state a claim); *Gifford* v. *Congress,* 452 F. Supp. 802 (E.D. Cal.

1978)(constitutional questions need not be certified when action deemed frivolous).

The standing requirement of §437h was tightly construed in *Martin Tractor* v. *Federal Election Commission,* 460 F. Supp. 1017 (D.D.C. 1978), *aff'd on grounds not based on §437h,* No. 79-1027 (D.C. Cir. May 8, 1980)(limited to actions by eligible voters who put at issue their rights as voters). *Contra, Bread Political Action Committee* v. *Federal Election Commission,* 591 F.2d 29 (7th Cir. 1979). A narrow reading was also given §437h in *Republican National Committee* v. *Federal Election Commission,* 461 F. Supp. 570 (S.D.N.Y. 1978)(court denied motion to intervene under §437h because to permit intervention would give every eligible voter in the United States the same right).[6]

To permit individuals to nullify the orderly enforcement procedures enacted by Congress at 2 U.S.C. §437g not only sanctions a waste of judicial resources (enforcement actions initiated by the Commission preceded by separate litigation of constitutional questions which

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[6] There are, however, two instances where courts have certified constitutional questions pursuant to §437h even in the absence of a separate action brought to construe the constitutionality of the statute. In *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980)(en banc), *reh. denied,* (2d Cir. March 5, 1980), the district court in which the Commission had brought its §437g enforcement action decided *sua sponte* to certify constitutional questions raised by the defendants to the court of appeals under §437h. More recently, in the course of an appeal of a district court subpoena enforcement order, a panel for the United States Court of Appeals for the Fifth Circuit *sua sponte* submitted a constitutional question to the *en banc* court under §437h. *Federal Election Commission* v. *Lance,* No. 79-1859 (5th Cir. May 5, 1980) (*en banc* proceeding still pending). These two cases have resulted in marked departures from the intended scope of §437h.

would otherwise be raised as defenses in the enforcement action and decided only if necessary) but also runs counter to the well-established principle that courts should not prematurely adjudicate constitutional questions. *See Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936)(Brandeis, J., concurring).

Allowing appellants to invoke 2 U.S.C. §437h in this situation will be a signal that every person against whom the Commission initiates an enforcement action may compel a court of appeals sitting *en banc* to first decide any constitutional questions raised and then require this Court to review the court of appeals' decision upon direct appeal. Such an expansive reading of §437h, as the court below recognized, J.S. App. A at A-26, would have a severe and disruptive effect on the calendars of courts of appeals, and actions might be delayed rather than expedited by the *en banc* requirement of §437h. *See* Leventhal, *Courts and Political Thickets,* 77 Colum. L. Rev. 345, 384-387 (1977). Inescapably, the opportunity for direct appeal to this Court would only encourage such suits and exacerbate the likely procedural morass.

III. In The Alternative, If An Appeal Lies Under §437h, The Court Should Summarily Affirm The Decision Below Because The Questions Certified Were Correctly Decided And Any Remaining Questions Are So Unsubstantial As Not To Need Further Argument.

Appellants ask this Court to overturn the decision of the court below upholding the constitutionality of 2 U.S.C. §441a(a)(1)(C) which limits to $5,000 per calendar year the amount which a person may contribute to a political committee.[7] Appellants contend that the $5,000 contribution limit violates their rights under the first amendment to the Constitution of the United States by preventing unlimited contributions to political committees such as CALPAC. They also claim that they are invidiously discriminated against because corporations and labor organizations, regulated under 2 U.S.C. §441b, are not subject to the $5,000 limit in paying for the establishment, administration, and solicitation expenses of their separate segregated political funds by operation of 2 U.S.C. §441b(b)(2)(C) and 2 U.S.C. §431(8)(B)(vi) (former 2 U.S.C. §431(e)(5)(F)(1976)).[8] The court of appeals correctly concluded, applying the rationale of *Buckley* v. *Valeo, supra,* that 2 U.S.C. § §431(8)(B)(vi), 441a(a)(1)(C), and 441b(b)(2)(C) are consistent with the first and fifth amendments to the Constitution of the United States. Thus, this Court should summarily affirm the decision of the court of appeals or, treating appellants' Jurisdictional Statement as a petition for certiorari, deny the petition. *See* note 4 *supra*.

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[7] *See* Appendix A for the text of §441a(a)(1)(C) and for the definitions of the terms "person", 2 U.S.C. §431(11), and "political committee", 2 U.S.C. §431(4).

[8] *See* Appendix A for the text of these provisions.

A. The $5,000 limit on contributions to political committees is constitutional.

The $5,000 limit on contributions by persons to political committees is an integral part of the comprehensive and well-balanced system of contribution limitations chosen by Congress to regulate the influence of money in federal elections. The court below properly viewed the $5,000 limit of §441a(a)(1)(C) as a necessary tool to prevent evasion of the $1,000 limitation on the amount which a person may contribute to a candidate:

> If the limits on payments to a political committee were to be erased, any association could give unlimited funds to a political committee. Donors could in effect use the the multicandidate committee as a vehicle for making $5,000 contributions to an unlimited number of candidates and thereby influence, in fact as well as appearance, the use of vast and substantial sums for direct candidate contributions. That would be an egregious distortion of the existing contribution limits of the Act, provisions specifically sustained by the Court in *Buckley.*

J.S. App. at A-8.

The constitutional analysis established by this Court in *Buckley* v. *Valeo, supra,* controls this case and fully supports the result reached by the court of appeals. J.S. App. A at A-13. In upholding the $1,000 limit on contributions to candidates, *Buckley*, 424 U.S. at 23-35, this Court found a clear distinction between a person spending money directly for speech and giving money to someone else to be spent for speech:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability

> to engage in free communication. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21. Thus, this Court upheld the $1,000 limitation on contributions to a candidate against challenges that the limitation unconstitutionally infringed upon both direct speech rights and associational rights. *Id.* at 22, 26, 27.

As the court below found, the contribution limitation attacked by appellants serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley*. J.S. App. A at A-13 to A-15. The limitation of §441a(a)(1)(C) is a "proper mechanism" to ensure compliance with the $1,000 limitation on contributions to a candidate, J.S. App. A at A-17, for it prevents persons from contributing massive unlimited sums to political committees such as CALPAC thereby effecting contributions to candidates well beyond $1,000 in amount.[9]

For virtually identical reasons this Court in *Buckley* upheld the overall $25,000 limitation on contributions

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[9] CMA, an unincorporated association, is not subject to an annual overall $25,000 contribution limitation as are individuals. *See* 2 U.S.C. §441a(a)(3). CALPAC, in turn, as a multicandidate committee, *see* 2 U.S.C. §441a(a)(4), may contribute up to $5,000 to as many candidates as it chooses.

by individuals, whether to candidates or to political committees, former 18 U.S.C. §608(b)(3)(1974); present 2 U.S.C. §441a(a)(3):

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

424 U.S. at 38.[10]

Appellants suggest that a limitation on contributions to a political committee is like the limitation on independent expenditures invalidated in *Buckley* v. *Valeo,* 424 U.S. at 39-51, rather than like the limitations on contributions upheld by the Court. J.S. at 21. But, as the court below correctly observed, J.S. App. A. at A-11 n.5, to the extent that persons wish to contribute to a political committee with a "broad and diverse constituency of supporters" and thereby relinquish control over the disposition of funds, the impact on their

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[10] This Court upheld a stricter limitation in *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980)(en banc)(per curiam), *aff'd,* 100 S. Ct. 1639 (1980)(total prohibition on private contributions to publicly-funded presidential candidates was held constitutional under first amendment standards).

associational freedoms is no more severe if those in control of the political committee decide to make independent expenditures rather than contributions.[11] The associational right of the contributor is in the giving, not in the disposition by the political committee.[12] Moreover, to the extent persons wish to use their funds without limit for direct independent expenditures, that avenue is always open to them acting separately. J.S. App. A at A-11 n.5. Finally, political committees such as CALPAC are not themselves limited in the amount of independent expenditures they may make on behalf of candidates.[13] The $5,000 limit on contributions to CALPAC does not limit the overall amount which CALPAC may receive to make independent expen-

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[11] The court in *Mott* v. *Federal Election Commission, supra,* specifically disclaimed the argument made by appellants here that §441a(a)(1)(A) is unconstitutional because political committees may choose to make independent expenditures. The court there held that "[t]ransfers of money to enable another to speak are not entitled to the same deference as direct expenditures, and are consequently subject to reasonable regulation." *Id.,* Memorandum Opinion at 8, 9. The Commission has included the *Mott* decision herein as Appendix B.

[12] CALPAC, engages in relatively little independent expenditure activity and therefore its supporters cannot claim the harm to which CALPAC alludes. Public reports filed by CALPAC indicate that in the last election cycle of 1977-1978, its receipts totalled $705,755.72 for the period. Of that amount, $26,100 was expended for contributions to federal candidates, while none was spent for independent expenditures on behalf of federal candidates. Moreover, the very purpose of securing multicandidate committee status is to enable a committee such as CALPAC to contribute larger amounts to federal candidates. *Compare* 2 U.S.C. §441a(a)(1)(A) and (2)(A). Thus, CALPAC's emphasis is clearly on making contributions to candidates rather than independent expenditures. Indeed, CMA's speech interests are one step further removed than those of the contributors to candidates analyzed in *Buckley.* CMA's speech is in giving to a political committee which itself engages primarily in making contributions to candidates rather than direct expenditures.

[13] *But see* 26 U.S.C. §9012(f).

ditures, and there is no record showing that the limit of §441a(a)(1)(C) has had a "dramatic adverse effect" on CALPAC's fundraising abilities.[14]

B. Separate regulation of corporations and labor organizations under 2 U.S.C. §441b does not invidiously discriminate against unincorporated associations or violate their first amendment rights.

This Court has stated that the act of classifying does not itself deprive anyone of equal protection of the laws. *See, e.g., Carrington* v. *Rash,* 380 U.S. 89, 92 (1965), relying on *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483 (1955), *reh. denied,* 349 U.S. 925 (1955). Since all legislation involves some degree of classification, this Court has upheld federal statutes which establish reasonable classifications. *Buckley* v. *Valeo,* 424 U.S. at 93-108; *Schesinger* v. *Ballard,* 419 U.S. 498 (1975), *reh. denied,* 420 U.S. 966 (1975); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op,* 307 U.S. 533 562-568 (1939).

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[14] In response to concerns that the limitations on contributions dealt with in *Buckley* would preclude candidates and political committees from amassing the resources necessary for effective advocacy, this Court stated:

> There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. [footnote omitted]. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21, 22. Because CALPAC is able to receive up to $5,000 from every one of CMA's members, the associational interests of CMA and its members are given substantial outlet.

Both corporations and labor organizations have traditionally been treated as special creatures of the law. *Dartmouth College* v. *Woodward,* 17 U.S. 250, 303 (4 Wheat. 518, 636)(1819); *United States* v. *White,* 322 U.S. 694, 703 (1944); *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344 (1922). Congress plainly may view corporations and labor organizations as distinct, definable organizations particularly worthy of separate classification under the law.[15]

The legislative history of 2 U.S.C. §441b establishes a compelling governmental interest in strictly limiting political expenditures of corporations and labor organizations. Congress concluded that corporations and labor organizations were able to aggregate such potentially disrupting power and influence in connection with federal elections that prohibitions on their contributions and expenditures were justified. *See Pipefitters Local Union No. 562* v. *United States,* 407 U.S. 385, 403-405 (1972); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,* 352 U.S. 567, 570-584 (1957); *United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 113, 114 (1948).[16]

[15] Where Congress has wished to treat corporations and unincorporated associations alike, it has expressly so provided. *See e.g.,* 26 U.S.C. §7701(a)(3) and *Morissey* v. *Commissioner of Internal Revenue,* 296 U.S. 344 (1935)(trust held to be association within meaning of §7701's definition of "corporation"). On the other hand, where Congress has wished to treat corporations differently than unincorporated associations, this Court has approved the distinction on grounds of "certainty of application" and deference to the legislature. *United Steelworkers of America, AFL-CIO* v. *R.H. Bouligny, Inc.,* 382 U.S. 145 (1965)(labor union not treated as corporation for diversity jurisdiction purposes). *See also* 28 U.S.C. §1332(c).

[16] Numerous federal courts have held the prohibition constitutional in the context of specific cases. *United States* v. *Chestnut,* 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied,* 429 U.S. 829 (1976); *United States* v. *Boyle,* 482 F.2d 755 (D.C. Cir. 1973), *cert.*

With the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, in what became known as the Hansen Amendment, Congress exempted from the overall ban on corporate or union political spending, *inter alia,* payment for the administration and solicitation expenses of separate segregated political funds. *See Pipefitters,* 407 U.S. at 409-412, 421-427, 429-432; present 2 U.S.C. §441b(b)(2)(C). That Congress, subsequent to the imposition of the broad ban on corporate and union contributions or expenditures, exempted certain specified payments does not negate the underlying rationale of the classification.[17]

Appellants essentially argue that Congress must permit all associations the benefit of an exception to a broad prohibition directed only at corporations and

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denied, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562,* 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc,* 434 F.2d 1127, *rev'd on other grounds,* 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed,* No. 80-1488 (D.C. Cir. 1980); *Federal Election Commission* v. *Weinsten,* 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford,* 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association,* 239 F. 163 (W.D. Pa. 1916).

[17] Appellants place reliance on this Court's holding in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), apparently for the proposition that Congress cannot differentially regulate corporations and labor organizations on the one hand, and unincorporated associations on the other. J.S. at 27-29. However, that case hardly stands for such a proposition. This Court there held that the corporate status of the plaintiff-appellee did not remove its speech from the protection of the first amendment. *Id.* at 778-786. It did not hold that the statute there involved required unincorporated associations to be regulated equally with corporations, nor did it assert such a proposition as a general principle.

labor organizations.[18] Appellants have not argued, however, that the concomitants of the broad prohibition — the total ban on making direct contributions to candidates or committees or independent expenditures on behalf of candidates — must also extend to all associations. By this attack, appellants seek to destroy the balance established by Congress in its regulation of money spent by corporations and labor organizations and that spent by individuals and other groups.

However, the statutory scheme created by Congress, by setting its present balance, has met the constitutional requirements of due process, and appellants should not be heard to complain simply because they would have enacted regulatory provisions more favorable to their organization.[19]

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[18] California has a unique state statute applicable to CMA which provides that an "organized medical society" may, without incorporating, have limited liability for its members for the debts or liabilities of the medical society. Cal. Corp. Code, Tit. 3, Chap. 3, §21200 (West 1980 Supp.).

[19] Appellants seek to raise as a separate issue in their appeal the statutory question of whether the term "membership organization" in present 2 U.S.C. §441b(b)(2)(C) means unincorporated associations such as CMA. If so construed, appellants argue, CMA could pay without limit for CALPAC's administration and solicitation expenses. However, the court below was unanimous in finding appellants' argument groundless. J.S. App. A. at A-20, A-21 (opinion of the court); A-49 to A-51 (dissent). *See also* 122 Cong. Rec. 7197-98, 12468-69 (1976).

CONCLUSION

This case should be dismissed on the ground that appellants may not invoke the appellate jurisdiction of this Court. In the alternative, for the reasons set forth above, the Court should summarily affirm the decision below because the court of appeals correctly decided the issues raised herein, applying principles established by this Court. To the extent that the jurisdictional statement may be construed as a petition for certiorari, the petition should be denied.

RESPECTFULLY SUBMITTED,

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

SCOTT E. THOMAS
Attorney

Attorneys for

FEDERAL ELECTION COMMISSION,
MAX L. FRIEDERSDORF,
JOHN W. MCGARRY,
JOAN D. AIKENS,
THOMAS E. HARRIS,
FRANK P. REICHE,
ROBERT O. TIERNAN,
EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

August 26, 1980

APPENDIX

APPENDIX A

Statutes Involved

I. 2 U.S.C. §437g.....

II. 2 U.S.C. §437h.....

III. 2 U.S.C. §441a(a)(1)(C).....

IV. 2 U.S.C. §441b.....

V. 2 U.S.C. §431(8)(B)(vi); former 2 U.S.C. §431(e)(5)(F).....

VI. 2 U.S.C. §431(4), 431(11).....

I.

2 U.S.C. §437g Enforcement

(a)*Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint, shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in

the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause ex-

cept pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter

96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against

whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph A shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calender quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar

year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which contitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

II.

2 U.S.C. §437h. Judicial review

(a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited disposition of certified questions.* It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

III.

2 U.S.C. §441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

IV.

2 U.S.C. §441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation,

national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraph (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicita-

tions for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted

by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

V.

2 U.S.C. §431 Definitions

(8) (B) The term "contribution" does not include—

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

former 2 U.S.C. §431 (1976) Definitions

(e) "contribution"—

(5) does not include—

(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;

VI.

2 U.S.C. §431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STEWART RAWLINGS MOTT, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

Civil Action No. 79-3375

MEMORANDUM OPINION

Barrington D. Parker, *District Judge:*

Plaintiffs Stewart Mott, Patricia Stahlman, and the National Conservative Political Action Committee (NCPAC) have brought this suit for declaratory and injunctive relief against the Federal Election Commission (FEC) and its members. They allege that certain provisions of the Federal Election Campaign Act of 1971, as amended, (FECA), FEC regulations, and FEC advisory opinions and opinion letters are, unconstitutionally overbroad and vague both on their face and as applied because they interfere with plaintiffs' ability to make certain contributions and independent expenditures.[1] Defendants have moved to dismiss on the grounds

[1] Plaintiffs allege that the following sections of the Federal Election Campaign Act, as amended, are unconstitutionally overbroad or vague: 2 U.S.C. §431(4) (formerly 431(d) which defines "political committee"; section 431(8) (formerly 431(e) which defines "contribution"; section 441a(a)(1)(C) which limits contributions to political committees (other than candidates and national party committees) to $5000 per year; section 441a(a)(2)(C) which limits a multicandidate committee's contributions to political committees

that some of the claims are not ripe for adjudication while others fail to state a claim upon which relief can be granted.[2] Common Cause, appearing as *amicus curiae*,[3] has also filed a brief urging dismissal. After weighing the arguments presented by the parties and *amicus*, the Court concludes that the complaint should be dismissed.

BACKGROUND

Plaintiffs' claims flow from two types of contemplated activity. First, plaintiff Mott states that he wishes "to join with other like-minded individuals in purchasing. . .advertising space" in the *New York Times* "in order to publicize his views," but that he fears the FEC will consider this joint

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(other than candidates and national party committees) to $5000 per year; section 441a(a)(2)(C) which limits a multicandidate committee's contributions to political committees (other than candidate or party committees) to $5000 per year; and section 441a(a)(3) which limits total contributions by an individual to $25,000 per year.

Plaintiffs allege the following regulations are similarly overbroad or vague: 11 C.F.R. §110.14 which defines a "single candidate committee"; section 110.1(d) which imposes limits on contributions to committees making independent expenditures; section 110.1(h) which regulates contributions to a committee supporting a candidate, if the contributor has already contributed directly to the candidate's committee; and section 110.2(a)(3) which restates the limitation set in 2 U.S.C. §441a(a)(2)(C).

[2] In its motion, the FEC originally asked that all but two of plaintiffs' claims be dismissed and that the remaining two, the challenges to the $5,000 limit on contributions to political committees and to the definition of "contribution," be prepared for certification to the Court of Appeals. At the hearing on the motion to dismiss, however, counsel for the FEC stated that the Commission had revised its assessment in light of recent developments and now believed that the entire case should be dismissed. Transcript of Hearing on Motion to Dismiss, June 20, 1980 (Transcript) 17-18.

[3] Common Cause is a non-profit membership corporation with approximately 225,000 members which has participated actively in congressional consideration of the statutes challenged in this case and in numerous cases concerning the constitutionality and implementation of the federal election laws.

endeavor to be a "political committee" under FECA and require it to register as such. In addition, Mott claims that the FEC will apply the amount spent in the joint purchase against the various dollar limits FECA imposes on contributions to political committees by an individual.

Plaintiff Stahlman alleges that she wishes to contribute more than the section 441a(a)(1)(C) limit of $5000 to NCPAC to enable that organization to make independent expenditures. She claims she has not done so because the FEC will interpret this to be a contribution in excess of the statutory limits, even though it is "earmarked for the purpose of NCPAC's making of independent expenditures"—the type of expenditure which under *Buckley* v. *Valeo,* 424 U.S. 1 (1976), cannot constitutionally be limited. In addition, Stahlman objects that these contributions to NCPAC would be counted against the $25,000 annual limit on contributions in section 441a(a)(3). Mott expresses a similar desire to contribute to a "single-issue" organization, but specifies neither the amount nor the recipient of his contemplated donation. Plaintiffs charge that the FECA provisions and FEC regulations proscribing these activities are unconstitutionally vague and overbroad, both as applied to these plaintiffs, and on their face, and ask that these challenges be certified to the en banc Court of Appeals pursuant to 2 U.S.C. § 437h.[4]

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[4] Plaintiffs seek certification under 2 U.S.C. §437h which provides:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Jurisdiction is also alleged under 28 U.S.C. §1331.

There is some question as to whether plaintiff NCPAC has standing to invoke the certification provision in section 437h, since it is

ANALYSIS

Despite the mandatory phrasing of the certification provision, district courts presented with complaints brought under section 437h need not automatically certify every constitutional question raised to the en banc court of appeals. *See Martin Tractor Company* v. *FEC,* No. 78-2080, *National Chamber Alliance for Politics* v. *FEC,* No. 79-1027(D.C. Cir. May 8, 1980)(consolidated appeals hereinafter referred to as *Martin Tractor)(unripe constitutional questions may be dismissed and need not be certified); Gifford* v. *Congress,* 452 F. Supp. 802, 806 (E.D.Cal. 1978)(frivolous constitutional questions may be dismissed without certification). The district court's role in a 437h case has been compared to that of a single judge presented with a motion to seek the convening of a three judge court to hear constitutional challenges. *See Clark* v. *Valeo,* 559 F.2d 642, 645-46 (D.C. Cir.)(en banc), *aff'd* 431 U.S. 950 (1977). Under the three judge court statutes, a single judge could dismiss constitutional claims which had already been decided, without convening the special panel. *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962).

At least one district court has believed that a complaint must state "substantial" constitutional questions in order to invoke the certification process. The first court to be presented with a section 437h request observed that the case should be expedited "provided only that a substantial constitutional question is raised by a complaint and that complaint is filed by a party having standing to lodge it." *Buckley* v. *Valeo,* 387 F. Supp. 135, 138 (D.D.C.) *remanded,* 519 F.2d 817 (D.C. Cir. 1975)(en banc). In remanding the Court of Appeals did not disturb the district court's express finding that "the plaintiffs raise substantial constitutional questions." 387 F. Supp. at 138. The Court of Appeals directed only that the district court specifically identify the

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not among the categories of persons named in the statute. *See Martin Tractor* v. *FEC,* No. 78-2080, 6 n.6 (D.C. Cir. May 8, 1980). The Court need not decide this question, since NCPAC's claims are essentially the same as those presented by plaintiff Stahlman, who clearly has standing to raise them under section 437h.

questions presented and take whatever evidence was necessary to make findings of fact to augment the record before certifying the identified questions. 519 F.2d at 818.

Judicial interpretation of the section 437h procedure thus suggests that this Court may initially review a complaint to determine if it presents a ripe and substantial constitutional controversy before certifying questions to the en banc court of appeals.[5]

The legislative history of the certification provision is not at odds with this interpretation. Section 437h was inserted into the Federal Election Campaign Act by an amendment offered by Senator Buckley to the Federal Election Campaign Act Amendments of 1974.

Senator Buckley believed major portions of the 1974 legislation to be unconstitutional. *See* 120 Cong. Rec. 10557-62 (1974). Although unsuccessful in his efforts to have the offending provisions dropped from the bill, he managed to persuade his colleagues to include the expedited review procedure now embodied in section 437h. In explaining the purpose of his amendment he stated:

> It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562. The amendment was accepted without debate and without prejudice. *Id.* at 10563. Arguably,

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[5] As to whether a question is substantial or not, the Supreme Court has observed, again in the context of three judge court proceedings:

> The lack of substantiality in a federal question may appear either because it is so obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court.

California Water Service Co. v. *City of Redding,* 304 U.S. 252, 255 (1938)(per curiam). *See Green* v. *Board of Elections,* 380 F.2d 445, 448 (2d Cir. 1967).

Senator Buckley was concerned only with the expedited review of the sweeping changes contained in the 1974 Amendments.[6] In any event, it is apparent that he felt that the expedited procedure should be available only where a "serious" constitutional question was presented. Presumably other claims were to be screened out and dismissed by the district court. *See Gifford*, 452 F. Supp. at 807, 810.[7] After reviewing the claims presented by the complaint in this case, the Court concludes that they should be dismissed.

The Court finds that those claims which derive from Mott's desire to purchase advertising space in the *New York Times* are not ripe for judicial decision. On the basis of the limited facts outlined in the complaint, the Court cannot determine whether Mott's joint purchase of advertising space would be covered by those sections of FECA regulating contributions to political committees. Mott insists that he can discern an FEC policy which indicates that the agency would consider his behavior to be covered by the Act. *Amicus*, however, argues that a straightforward application of the definitions of "contribution" and "political committee" places a "joint purchase" of advertising space beyond the reach of statute and regulations. Mott's statement of his claims aggravates this problem of interpretation. The allegation that Mott wishes to "join with others" is broad enough to encompass a spectrum of association from a single meeting of would-be advertisers at the *New York Times* where separate checks are tendered, to a full fledged political committee contemplating a series of advertisements and solicitations to support their activities. Plaintiff, however, has declined to be more specific.[8] Clearly, a federal court should not pass on constitutional questions in the absence of a more fully developed factual record. *See Martin Tractor*, slip op. at 25.

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[6] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 385 (1977).

[7] Automatic certification of *all* constitutional questions to an en banc court of appeals could compound the difficulties inherent in en banc proceedings. *See* Leventhal, *supra* note 6, at 385.

[8] *See* Transcript at 34-37.

Mott's claims present another problem. Mott has asked the Court to determine if certain sections of the Act and regulations apply to him, and, if they do, certify certain constitutional questions presented by those provisions to the Court of Appeals. The first part of that request is misdirected. The Federal Election Campaign Act gives the FEC the power to issue advisory opinions on the application of the statute and regulations in specific situations. The Act was recently amended to make the advisory opinion process available to all "persons" and requires the Commission to respond within sixty days.[9] To date, the FEC has not rendered an opinion on the situation Mott appears to be advancing, and Mott has not requested one. Because such a ruling could dispose of the issues Mott presents, and because of the ripeness problems inherent in Mott's claims, the Court will dismiss this first aspect of the complaint. *See Martin Tractor*, slip op. at 27.

The second aspect of the complaint attacks the statutory and regulatory provisions which limit contributions to political committees purportedly made to enable those committees to make independent expenditures. This aspect involves primarily plaintiff Stahlman's claims. Stahlman asserts that she wishes to contribute more than $5,000 to NCPAC to enable that organization to make independent expenditures, but that she is prevented from doing so by the $5,000 limita-

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[9] Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, §107 (January 8, 1980). Final Congressional action on this legislation was completed on December 20, 1979, three days after plaintiffs brought this action on December 17.

In support of their request to have the Court interpret FEC policy, plaintiffs rely on the Second Circuit's decision in *FEC* v. *Central Long Island Tax Reform Immediately Committee (CLITRIM)*, No. 79-3014 (2d Cir. Feb. 5, 1980). *CLITRIM*, however, is distinquishable on the grounds that it involved constitutional challenges brought as defenses to an FEC enforcement action. There was no need for the Court to divine FEC policy on an indefinite set of facts; both the legal and factual background were well-established.

tion imposed by section 441a(a)(1)(C) and by the overall $25,000 limitation in section 441a(a)(3). Since under *Buckley* v. *Valeo*, 424 U.S. 1, 58-59 (1976) there can be no limits on independent expenditures by a person or a political committee, Stahlman argues that there can be no limit on what she styles as "donations" made to finance independent expenditures by political committees such as NCPAC.[10]

Stahlman's claims in essence present three identifiable constitutional questions which may be stated as follows:

(1) Whether the definition of "contribution" in section 431(8), is unconstitutionally overbroad or vague under the first and fifth amendments in that it applies to donations by a person to a political committee made for the purpose of enabling that committee to undertake independent expenditures?

(2) Whether section 441a(a)(3), which limits total contributions by an individual within any calendar year to $25,000 is unconstitutional under the first and fifth amendments?

(3) Whether section 441a(a)(1)(C), which limits contributions by a person to a political committee to $5,000 in any calendar year, is unconstitutional under the first and fifth amendments?

The *Buckley* decision answers each question in the negative. The $25,000 overall limit on contributions was specifically upheld as a "corollary of the basic individual contribution limitation" found to be constitutional. 424 U.S. at 38. Moreover, in ruling on the constitutionality of the contribution limitations, the Court used and implicitly sustained the Act's definition of "contribution" which, the Court noted, included "dollars given to another person or organization that are earmarked for political purposes. . . ." 424 U.S. at 24 n.24.

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[10] Transcript at 51. Stahlman's contemplated transfer is nonetheless a "contribution" under 2 U.S.C §431(8) (formerly 431(e).

As to the third question, although the Court in *Buckley* did not specifically consider the $5,000 limit on contributions to political committees contained in section 441a(a)(1)(C),[11] the reasoning in the Supreme Court's per curiam opinion clearly indicates that the restriction is constitutional. In *Buckley,* the Court explained the rationale for sustaining contribution limits:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. . . .
>
> By contrast with a limitation upon expenditures for political expression, a limititation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated,

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[11] This limitation was added after the Supreme Court's decision in *Buckley* v. *Valeo* by the Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, §112, 90 Stat. 475, 486 (1976).

> symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contributor's freedom to discuss candidates and isssues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. (Footnotes omitted.)

Id. at 19-21.

In short, a limitation on contributions infringes far less on first amendment freedoms than does a limitation on expenditures, because it involves restrictions on indirect rather than on direct expression. Whatever infringement does occur is justified by the compelling need to curb the "actuality and appearance of corruption" flowing from large individual contributions. *Id.* at 26.

Plaintiffs point out that in *Buckley,* the Supreme Court had before it only limits on contributions to candidates and not contributions to 'independent" political committees. According to plaintiffs the interest in limiting contributions to candidates—the limitation of the actuality or appearance of a *quid pro quo* for large political contributions—disappears when the contribution is made to a committee such as NCPAC. Plaintiffs conclude that limits on these contributions to fund independent expenditures thus abridge first amendment guarantees without the necessary justification.

Congress, however, felt otherwise, The Conference Committee Report on the Federal Election Campaign Act Amendments of 1976 explained the reasons for the limitation on con-

tributions to non-candidate committees contained in 441a(a)(1):

> [F]irst, these limits restrict the opportunity to circumvent the $1000 and $5000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions that the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Rep. No. 94-1057, 94th Cong., 2d Sess. 57-58 (1976). As the first and third reasons cited in the report demonstrate, Congress was clearly concerned that the "independent" political committee might become a vehicle for avoiding the restrictions placed on direct contributions to candidates.

The en banc Ninth Circuit recently approved this rationale in *California Medical Association (CMA)* v. *FEC*, No. 79-4426, slip op. 4-13, (9th Cir. May 23, 1980)(en banc)(summarized at 48 L.W. 2828 (June 24, 1980)) when it sustained the $5,000 limit on contributions to political committees against a constitutional challenge brought pursuant to section 437h. The *CMA* court found *Buckley* controlling, and held that section 441a(a)(1)(C)'s $5,000 limit imposed a minimal and narrowly-drawn restriction on the plaintiff association's first amendment rights, and that this restriction was justified by the important governmental interest involved. Slip op. at 12-13. In a footnote, the Ninth Circuit discussed the impact of this particular contribution limit on free expression and found it comparatively slight; those who but for the limits would contribute large amounts to help finance independent expenditures by political committees are still free to spend as much as they wish on their own. Slip op. at 9 n. 5.

In sustaining the $5,000 limit on contributions to political committees *CMA* merely applies the *Buckley* rationale that transfers of money to enable another to speak are not entitled

to the same deference as direct expenditures, and are consequently subject to reasonable regulation. These two authorities foreclose any challenge to the $5,000 contribution limits and require that plaintiff Stahlman's claims be dismissed along with plaintiff Mott's.

An appropriate Order accompanies this memorandum.

/s/ BARRINGTON D. PARKER

United States
District Judge

Entered: June 30, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEWART RAWLINGS MOTT, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 30 day of June, 1980

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed for the reasons that:

(1) plaintiff Mott's challenges concerning his desired advertisement activities are dismissed as not presenting a ripe case or controvery (Fed R. Civ. P. 12(b)(1));

(2) plaintiffs' challenges to those provisions of the Federal Election Campaign Act limiting contributions are dismissed as an issue already decided by the Supreme Court (Fed R. Civ. P. 12(b)(6)).

/s/ BARRINTON D. PARKER

Barrington D. Parker
United States
District Judge